

IN THE SUPREME COURT OF FIJI
[CIVIL APPELLATE JURISDICTION]

CIVIL PETITION No: CBV 0008 of 2016
(On Appeal from Court of Appeal No: ABU 007.2016)

BETWEEN : **FIJI INDUSTRIES LIMITED**

Petitioner

AND : **NATIONAL UNION OF FACTORY AND COMMERCIAL**
WORKERS

Respondent

Coram : Hon. Mr. Justice Suresh Chandra, Judge of the Supreme Court
Hon. Mr. Justice Brian Keith, Judge of the Supreme Court
Hon. Mr. Justice William Calanchini, Judge of the Supreme Court

Counsel : Ms. U. Kunatuba for Petitioner
Mr. V. Maharaj for Respondent

Date of Hearing: 12 October 2017

Date of Judgment: 27 October 2017

JUDGMENT

Chandra J:

1. I agree with the reasoning and conclusion of Keith J.

Keith J:**Introduction**

2. This case relates to an employment dispute. The employers wish to appeal against a decision of the Employment Relations Court. The twist in the story is that their solicitors filed the notice of appeal out of time, and a single judge of the Court of Appeal refused to extend the time for filing it. The employers now seek leave to appeal to the Supreme Court from that refusal. It is a little difficult at first blush to see how an issue relating to an extension of time for filing a notice of appeal could raise either a far-reaching question of law, or a matter of great general or public importance, or a matter which is otherwise of substantial general interest to the administration of justice - which are, of course, the only three circumstances in which the Supreme Court can grant leave to appeal. The employers seek to overcome that hurdle by arguing, among other things, that the underlying dispute raises at least one of these matters, and that the merits of the dispute are such as to make it at least arguable that leave to appeal should be granted.

3. The case is a salutary reminder of what can happen if it takes an inordinate length of time for a case to be decided in the courts. In brief, the employers were ordered to reinstate one of their employees. They were also ordered to pay the employee the equivalent of three months' pay, and the employee was to be treated as if he had been on unpaid leave for the rest of the period between his dismissal and his reinstatement. The employers brought an application for judicial review challenging the award, and the High Court stayed the award, presumably until the application for judicial review had been disposed of. However, it took four years for the court to hand down its judgment on the application for judicial review. It dismissed the application, and in due course the employee was reinstated, and the Employment Relations Tribunal subsequently ordered him to be paid the equivalent of his salary from the date when he should have been reinstated. The employers appealed, and the question for the Employment Relations Court was whether in these circumstances the employee should be compensated for the period he was out of work between when his reinstatement would have taken place but for the stay and the date of his actual reinstatement. The Employment Relations Court decided that he was entitled to be compensated for that period.⁰

4. The course which the proceedings have taken so far is of some importance, and I trust that I will be forgiven for going into it in some detail.

The course of the proceedings

5. The employee's dismissal. The employee is Anisi Vaja. His employers are the petitioner, Fiji Industries Ltd ("the company"). Its main business is the manufacture of cement. Mr Vaja had been employed by the company for 15 years and had an impeccable record. He was dismissed from his employment on 9 January 2006 following an incident at a Christmas party at which he was alleged to have assaulted a fellow employee. Mr Vaja's case was taken up by his trade union, the National Union of Factory and Commercial Workers ("the union"), the respondent to the petition, and in due course the dispute was referred by the Ministry of Labour to an arbitration tribunal under section 6(1) of the Trade Disputes Act (Cap 97).

6. The arbitration tribunal's award. The arbitration tribunal's award was dated 7 May 2007. The arbitration tribunal found that that Mr Vaja had indeed assaulted his fellow employee and had done so in the presence of others. But it found that there were extenuating circumstances, and not just his long service and his excellent disciplinary record. His brother had recently died, the difference of opinion with his fellow employee had been over a personal matter relating to his brother's death and had not related to anything at work, and Mr Vaja had apologised at the first available opportunity for what he had done. In the circumstances, the arbitration tribunal thought that Mr Vaja's dismissal was harsh and unreasonable when seen against the background of the collective agreement between the company and the union, and it ordered his reinstatement not later than 14 days after the "publication" of the award. The award is regarded as "published" when it is made available for collection by the parties, and that would have been within a day or so of its promulgation.

7. In addition, the arbitration tribunal awarded Mr Vaja the equivalent of three months' pay for the period between his dismissal and his reinstatement, adding that "the balance of the period is to be treated as leave without pay". In other words, although over 16 months would have elapsed between his dismissal and when he had to be reinstated by, he was to be compensated for less than a quarter of that period. The arbitration tribunal did not say why it limited the award in that way. It is possible, I

suppose, that Mr Vaja had got another job in the meantime, and his net loss amounted to the equivalent of three months' pay. But there is nothing in the award to suggest that, and it is much more likely that the arbitration tribunal thought that Mr Vaja had been to some extent the author of his own misfortune by the way his behaviour had contributed to his dismissal. There is some support for that in another element of the award, which was that the company was entitled to place a final warning on Mr Vaja's personnel file over the incident. But that is just speculation on our part: the fact is that the arbitration tribunal did not spell out its reasons for that part of the award.

8. *The stay on the award.* The company decided to challenge the award by an application for judicial review. The notice of motion was dated 18 May 2007. The respondents to the application were the arbitration tribunal and the union. The application first came before the court on 30 May 2007. Although the notice of motion had not included an application for a stay on the enforcement of the award, Byrne J stayed the award "until further order". There is no written ruling about the stay in the court file, but Byrne J must have concluded that Mr Vaja should not be reinstated until it was known whether the challenge to the order for his reinstatement had succeeded. His thinking almost certainly would have been that if the challenge were to succeed, it would be unfair to saddle the company for the time being with an employee who was not going to be reinstated.
9. *The progress of the application for judicial review.* All parties wanted the hearing of the application to be heard as soon as possible, and on 24 August 2007 it was ordered that the application should be expedited. The parties were ordered to file written submissions. The company did so on 22 November 2007, the arbitration tribunal did so on 11 January 2008, and the union did so on 31 January 2008. The application came before Jitoko J on 10 July 2008. After full argument that day, he reserved judgment.
10. It is well known that on 10 April 2009 all the judges in Fiji were removed from their posts. By then Jitoko J had regrettably not handed down judgment on the application, even though nine months had elapsed since the hearing. Many of the judges were reappointed but Jitoko J was not. That meant that the application had to be determined afresh by another judge. Calanchini J (as he then was) took over Jitoko J's

outstanding work, but unfortunately the file was never brought to his attention. Eventually the file was given to Wati J, and the application was listed before her on 30 August 2010. By then the case had been assigned to Hettiarachchi J, and so Wati J ordered a preliminary hearing before him to determine whether a further hearing was really necessary, or whether the application could be determined on the basis of the written submissions. All parties were content with the latter course, and on 29 November 2010, Hettiarachchi J went along with what the parties wanted. He said that he would hand down judgment on 15 February 2011. In the event, he did not do so until 7 October 2011, over four years after the application was first made, and over 10 months since he had agreed to decide the case on the parties' written submissions. The consequence of all this was that Mr Vaja was left in limbo for a very long time. As it was, Hettiarachchi J concluded that there had been no error of law on the part of the arbitration tribunal, and he dismissed the claim. There was to be no appeal from that decision. It meant that there was no longer any issue over Mr Vaja's reinstatement.

11. A curious feature of the application for judicial review is that there is nothing which tells us that leave for the application to be brought had been given. There is no reference to the grant of leave in Hettiarachchi J's judgment. He must have assumed that leave had been given. Nor is there any reference to the grant of leave in the court file. On the other hand, Byrne J is unlikely to have stayed the award if he had not at the same time been giving leave for the application to proceed, and we have to assume that by mistake the order giving leave had not been included in the order of 30 May 2007 when it was dawn up two days later.
12. The dispute over Mr Vaja's compensation. Mr Vaja was reinstated on 13 December 2011. We do not know why it took the company over two months to do that. After all, he should have been reinstated immediately if the original award (which had survived the challenge to it) was to be complied with. But the real dispute between the union and the company was over how Mr Vaja was to be compensated. The dispute did not relate to the period from his dismissal to the date of the arbitration tribunal's original award. That had been dealt with by the arbitration tribunal: Mr Vaja was to be paid the equivalent of three months' pay for that period. The dispute related to the period from when Mr Vaja should have been reinstated, ie within 14

days of 7 May 2007 (give or take a day or so), and the date when he was actually reinstated, ie 13 December 2011. The union argued that he should be compensated for the whole of that period. The company argued that he should not.

13. In order to get the issue resolved, the union applied on 26 April 2012 to the Employment Relations Tribunal ("the ERT") (a) for an order requiring the company to comply with the original award made by the arbitration tribunal, and (b) for any further order which the ERT thought appropriate. Since the company had already complied with the award by reinstating Mr Vaja (albeit a little late) and by paying him the equivalent of three months' pay for the period up to when he would have been reinstated but for the stay, the relief which the union was really seeking for Mr Vaja under (b) was the equivalent of his salary from then until his actual reinstatement. The ERT's decision on this application was given on 6 June 2013. It held that Mr Vaja's reinstatement should be "effective" 14 days after the original award - in other words, that Mr Vaja should be treated as having been reinstated by 21 May 2007 - and that he should be "renumerated accordingly" . It is common ground that what the ERT meant by that was that Mr Vaja should be paid the equivalent of his salary in respect of the period from 21 May 2007 and the date of his actual reinstatement, ie 13 December 2011.
14. *The appeal to the Employment Relations Court.* The company was dissatisfied with this outcome. It decided to appeal to the Employment Relations Court ("the ERC"). It purported to do so by a notice of appeal filed on 5 July 2013. I say "purported" to do so because it was filed one day out of time. An appeal to the ERC has to be made within 28 days of the date of the decision of the ERT: see section 242(2) of the Employment Relations Act 2007 ("the Act"). However, neither the ERC nor the union picked that up, and if the company's legal team were aware of that, they did not mention it.
15. The appeal was heard by Wati J on 18 September 2014. She reserved judgment, handing down her judgment almost 15 months later on 1 December 2015. She dismissed the appeal, and ordered the company to pay Mr Vaja "all the wages for the period he was not reinstated pursuant to an award of the [arbitration tribunal]". Although she did not say so in so many words, she must have intended to exclude the

period from Mr Vaja's dismissal until 7 May 2007 because his compensation for that period had been limited to the equivalent of three months' pay, and he had already been paid it. She must have been referring to the period from 21 May 2007 (the date on which he would have had to be reinstated by but for the stay, give or take a day or two) to 13 December 2011 (the date when he was actually reinstated). This is the decision from which the company wishes to appeal. The ERC is a division of the High Court (see section 219 of the Act), so since Wati J's decision was made in the exercise of the High Court's appellate jurisdiction, an appeal lay to the Court of Appeal only on a question of law: see section 3(4) of the Court of Appeal Act (Cap 12).

16. The application for leave to appeal out of time. The time for filing the notice of appeal to the Court of Appeal was 28 days after 1 December 2015 when Wati J's judgment was delivered: see section 245(3) of the Act. The company did not file a notice of appeal within that time, and on 27 January 2016 it filed a summons seeking an extension of time for filing it. By then it was 29 days late. The evidence before the Court of Appeal was that the company had notified its solicitors on 15 December 2015 that it wished to appeal against Wati J's judgment, but that its solicitors had mistakenly thought (a) that the time limit was six weeks because that was the usual time limit for filing a notice of appeal to the Court of Appeal (see rule 16 of the Court of Appeal Rules), and (b) that the time would not run during the intervening legal vacation. Accordingly, when they tried to file the notice of appeal on 22 January 2016, they were not permitted to do so because by then the time for filing it had expired.
17. The summons was heard by Guneratne JA, sitting as a single judge of the Court of Appeal pursuant to section 20(1)(b) of the Court of Appeal Act (Cap 12). By his ruling dated 17 June 2016, he refused to extend the company's time for filing the notice of appeal, and it is from that ruling that the company now petitions the Supreme Court for leave to appeal.

The relevant principles

18. The factors which the courts in Fiji will consider when determining an application for an extension of time for filing a notice of appeal are well known. They were set out by Gates P in *Native Land Trust Board v Khan* [2013] FJSC 1 at [3]:

- "(i) The reason for the failure to file within time.
- (ii) The length of the delay.
- (iii) Whether there is a ground of merit justifying the appellate court's consideration.
- (iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
- (v) If time is enlarged, will the Respondent be substantially prejudiced?"

As Calanchini P observed in *Habib Bank Ltd v Ali's Civil Engineering Ltd* [2015] FJCA 47 at [15]:

"These matters should be considered in the context of whether it would be just in all the circumstances to grant or refuse the application. The onus is on the Appellant to show that in all the circumstances it would be just to grant the application."

To this one might add what was said in *Avery v Public Service Appeal Board (No 2)* (1973) 2 NZLR 86, namely that "[i]n order to determine the justice of any particular case the court should ... have regard to the whole history of the matter, including the conduct of the parties".

19. For my part, I would add a couple of things to all that. Since the reason for the delay is an important factor to be taken into account, it is essential that the reason is properly explained - preferably on affidavit - so that the court is not having to speculate about why the time limit was not complied with. And when the court is considering the reason for the delay, the court should take into account whether the failure to observe the time limit was deliberate or not. It will be more difficult to justify the former, and the court may be readier to extend time if it was always

intended to comply with the time limit but the non-compliance arose as a result of a mistake of some kind.

20. There are a number of cases in which the courts have had to consider applications for an extension of time for filing the notice of appeal where the failure to file it in time was the fault of the party's legal advisers. There is no rule that just because the litigant has not been at fault, he can escape the consequences of a mistake on the part of his lawyers. Nor is there any rule that because lawyers are expected not to make the sort of mistake which results in a notice of appeal not being filed in time, the litigant can never escape the consequences of such a mistake. It depends on the facts of each case. As Sir Wilfred Greene MR (as he then was) said in Gatti v Shoosmith [1939] 3 All E R 916 at p 919G-H:

"... the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, *may* be a sufficient cause to justify the court in exercising its discretion. ... [T]here is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter shall be so treated must depend upon the facts of each individual case."
(Emphasis supplied)

That remains the position today, and the facts which the court no doubt had in mind would have been the length of the delay, the extent to which the other party has been prejudiced by that delay, and the merits of the proposed appeal.

21. It has been said that the approach taken by the Court of Appeal in Fiji to mistakes by legal practitioners as a ground for extending the time for filing a notice of appeal has hardened over the years: see, for example, the observations of Calanchini P in Vunimoli Sawmill Ltd v Amrit Sen [2013] FJCA 140. At [14] he cited Vimal Construction and Joinery Works Ltd v Bimal Prakash [2008] FJCA 98 as an example of that. The Court had said:

"[15] ... litigants should not assume that leave will be given to bring or maintain appeals or other applications where those appeals or applications

are out of time unless there are clear and cogent reasons for doing so. A contention as to incompetence of legal advisers will rarely be sufficient and, where it is, evidence 'in the nature of flagrant or serious incompetence' (*R v Birks* (1990) NSWLR 677) is required.

[16] In this Court's view it is difficult to see why 'merit' of the appeal or proceeding, without more, would justify an extension of time except where the delay was minimal and no prejudice was occasioned by a respondent."

22. In my opinion, when the court said at [15] that a "contention as to incompetence of legal advisers will rarely be sufficient", it was saying that such a contention would rarely be sufficient *on its own*. In other words, there was no basis for saying that mistakes on the part of the lawyers should be an automatic gateway to permitting the appeal to proceed. There would have to be other factors in favour of allowing that to happen, such as only minimal delay, the absence of serious prejudice to the other party and a reasonable chance of success in the appeal itself. By the same token, the court was saying at [16] that a good chance of success in the appeal would not normally be enough. The delay would have to be minimal, and the other party would not have to be prejudiced by that delay.

23. Guneratne JA has himself added to the jurisprudence on this topic. In *Ghim Li Fashion (Fiji) Ltd v Ba Town Council* [2014] FJCA 192, he said at [27] that the law was as follows:

"(i) That, even where the length and the reasons for the delay are adequately explained to the satisfaction of Court, if an appellant is unable to satisfy Court as to his or her chances of success in appeal if the application for extension is to be granted, then the application must be rejected;

(ii) That, even if an appellant fails to satisfy court as to the length and reasons for the delay, nevertheless a Court shall allow an extension of time if it is satisfied that, an appellant has a reasonable chance of success should an application were to be granted;

(iii) Unless the reason for the delay is owing to a mistake or misconception as to the correct applicable legal position on the part of lawyers."

Guneratne JA endorsed these propositions in Gregory Clark v Zip Fiji [2014] FJCA 189, adding that he would welcome the views of the Full Court or the Supreme Court on these propositions.

24. Proposition (iii) is the one which is the most relevant to the present discussion, but I want to comment briefly on propositions (i) and (ii) as well. Their effect, subject to proposition (iii), is to make the merits of the appeal the paramount, indeed the decisive, consideration. In my view, that goes too far. There may be cases where the merits of the appeal may not be that good, but where the overall interests of justice mean that the litigant should not be denied the opportunity of having his appeal heard. By the same token, there may be cases where the merits of the appeal are strong, but the prejudice caused to the other party if the appeal was allowed to proceed would be so substantial that it would be an affront to justice for the delay to be excused.
25. The bottom line here is that each case should be considered on its facts, with none of the factors which the court is required to take into account trumping any of the others. Each factor is to be given such weight as the court thinks appropriate in the particular case. In the final analysis, the court is engaged on a balancing exercise, reconciling as best it can a number of competing interests. Those interests include the need to ensure that time limits are observed, the desirability of litigants having their appeals heard even if procedural requirements may not have been complied with, the undesirability of appeals being allowed to proceed which have little or no chance of success, and the prospect of litigants who were successful in the lower court having to face a challenge to the decision much later than they could reasonably have expected.
26. I turn to proposition (iii). This puts mistakes on the part of an appellant's legal advisers in a different category from errors made by the litigant himself. Guneratne JA explained the rationale for that in Gregory Clark. After quoting Lord Atkin's well-known statement in Evans v Bartlam [1937] AC 473 at p 479 that "there is not and never has been a presumption that every one knows the law ... [but] [t]here is the rule that ignorance of the law does not excuse ...", Guneratne JA said:

"[16] That principle must be applied with greater force in the case of lawyers. Laymen cannot be expected to know the law, for otherwise there will not be any need for a legal profession.

[17] The harshness of the principle may be relaxed in a fit situation to laymen but ought not to be so where lawyers are concerned, at least, not to the same extent in its application to laymen."

27. For my part, I would not treat mistakes made by lawyers as being in an exceptional category for this purpose. A mistake by a lawyer in the course of a case will by definition be in a legal context, and that mistake is no worse qualitatively than a layman's mistake in a non-legal context. Indeed, it might be said that if the mistake is that of the lawyer rather than that of the litigant, that is more of a reason for the litigant not to be penalised as a result of it. You could argue that he should not have to lose out because of someone else's mistake. And although Tompkins JA may have thought otherwise in *Native Land Trust Board v Subramani* [2004] FJCA 20 at [8], it would, I think, be no answer to that to say that the litigant can always sue his lawyer for such losses as arise from his inability to proceed with his appeal. It would be unfair to require him to bring satellite proceedings which would inevitably be vigorously defended by the lawyers - and particularly their insurers - on the basis that the appeal would have failed anyway. In my opinion, the fact that the mistake was made by lawyers is just one matter to be taken into account in the whole scheme of things, but it can in no way be decisive. Guneratne JA acknowledged that himself, I think, when he added to proposition (iii) the words "at least, not to the same extent in its application to laymen".

Guneratne JA's ruling in this case

28. *Mistakes by lawyers*. Guneratne JA touched on the issue which he had addressed previously about the significance of the mistake having been made by lawyers. But he did not refer to either of the two cases in which he had concluded that there is a difference between mistakes by lawyers and mistakes by laymen. Instead, he asked, echoing what had been said in *Vimal Construction*, whether the failure to check whether the time for filing a notice of appeal to the Court of Appeal ran during the

court vacation was mere incompetence or "in the nature of flagrant or serious incompetence". However, having posed that question, he did not proceed to answer it. Instead, he focused on the length and reason for the delay, the prejudice which Mr Vaja would have to put up with if time was extended, and the merits of the proposed appeal.

29. The length and reason for the delay. Guneratne JA thought that the delay had been for only 15 days, because like the company's solicitors he was unaware of the special time limit for filing a notice of appeal from decisions of the ERC. In fact the delay had been for 29 days. But however long the delay had been for, he thought that the delay was inexcusable. I agree with him. The solicitors should have checked what the time for filing a notice of appeal to the Court of Appeal from the ERC was and whether it ran during the legal vacation. They had no excuse for not doing that. Guneratne JA did not say in so many words that the failure to observe the time limit was not deliberate, but he must have appreciated that because he characterised it as a mistake. What is more contentious is what he had to say about the prejudice to Mr Vaja if the appeal was allowed to proceed.

30. The prejudice to Mr Vaja. The relevant prejudice is the further delay which would have been avoided if the notice of appeal had been filed in time. It should have been filed by 29 December 2015. Guneratne JA's ruling was handed down on 17 June 2016, so if Guneratne JA had extended time, the delay caused by the failure to comply with the time limit would have been over five months. Any delay has its consequences, but in the context of this case - in which Mr Vaja had been denied the reinstatement to which he was entitled for over four and a half years, and in which he had been waiting for the equivalent of his remuneration for that period for over a further four years up to the date when the notice of appeal should have been filed - many people might say that a delay of over five *further* months was not significant. Guneratne JA took a different view. He thought that the prejudice caused to Mr Vaja if the appeal was allowed to proceed outweighed the prejudice to the company if the appeal was not allowed to proceed.

31. Had I been deciding the case myself, I might well have reached a different conclusion. If the company's time was not extended, it would have been denied the opportunity to

argue that Mr Vaja should not have been awarded the equivalent of his pay for those four years. That is a significant downside when compared to the need for Mr Vaja to have to wait for a further five months for the appeal to be determined. But this is not my discretion to exercise. It was that of Guneratne JA, and I cannot say that his conclusion on the issue of prejudice was outside the generous ambit within which reasonable disagreement is possible.

32. There is a related point here. There is a suggestion that Guneratne JA regarded the many years which Mr Vaja had to wait for his reinstatement and then the additional time he had to wait to be compensated for that as relevant to the question of prejudice. To the extent that Guneratne JA did that, it is said that he should have taken into account as well the prejudice caused to the company by the lengthy delay in the determination of its application for judicial review - delay for which the company was in no way responsible. Had the application been considered and dismissed much earlier as it should have been, the company would have reinstated Mr Vaja much earlier. The company now has to pay compensation for a very long period when it did not have the benefit of his services.
33. However, none of this is relevant prejudice. The only relevant prejudice is the prejudice occasioned by the failure to file the notice of appeal in time, and the consequential delay of just over five months. It is true that Guneratne JA referred to the fact that Mr Vaja "had been deprived of the fruits of his victory for several years" without referring at the same time to the consequences for the company of the delay in the determination of its application for judicial review. But I think that Guneratne JA referred to that prejudice only in order to put the relevant prejudice in its proper context. That is borne out by the fact that he started his discussion on the issue of prejudice by referring to the lapse of time only between the judgment of the ERC and his own judgment.

The merits of the proposed appeal

34. That brings me to the merits of the proposed appeal. Since the delay was relatively short, the question for Guneratne JA was whether there was a ground of appeal of sufficient merit to justify an extension of time for filing the notice of appeal. Guneratne JA was not persuaded that there was. In the light of that, coupled with the

views he had taken about the length and reason for the delay as well as the prejudice to Mr Vaja if the appeal was allowed to proceed (neither of which were, in my opinion, legally flawed), he decided not to extend the company's time for filing the notice of appeal. So the only remaining question is whether there was indeed a ground of appeal of sufficient merit to justify an extension of time. As I have already said, such a ground of appeal had to be on a question of law. Guneratne JA did not mention that, and I therefore cannot say whether he had that in mind.

35. There were ten grounds of appeal in the notice of appeal which the company proposed to file. Guneratne JA distilled them into three core arguments, all of which did indeed in my opinion raise questions of law.
36. Core argument (1): The notice of motion to the ERT. It will be recalled that one of the orders which the union sought by its notice of motion to the ERT was an order requiring the company to comply with the original award made by the arbitration tribunal. I said earlier that the company had already complied with the original award by reinstating Mr Vaja and by paying him the equivalent of three months' salary for the period up to when he would have been reinstated but for the stay. That means that the relief which the union was really seeking for Mr Vaja was the equivalent of his salary from then until his actual reinstatement. The company's point was that one of the provisions pursuant to which the application to the ERT had been made had been section 212(1)(b) of the Act, and that provision relates only to applications for compliance orders, ie orders requiring compliance with a previous order. Since the previous order had been complied with, and since the relief which was really being sought was the equivalent of Mr Vaja's salary for a period not covered by the original award, that application had to have been made pursuant to a provision other than section 212(1)(b) of the Act. As it was, the notice of motion expressly referred to another provision pursuant to which the application was being made, namely section 238(2)(a) of the Act. That section provides that where no provision is made for a particular circumstance, the Magistrates Court Rules 1945 apply to proceedings before the ERT. Ord 26 of the Magistrates Court Rules provides that interlocutory applications may be made by motion. Since the new relief which the union was actually seeking was not interlocutory relief, the application could not have been made by notice of motion. It had to have been made by some form of originating

process. That rendered the proceedings before the ERT a nullity - at any rate, to the extent that they related to the application for the equivalent of Mr Vaja's salary for the period not covered by the original award - and there was no power in the Magistrates Court Rules (unlike the High Court Rules: see Ord 2 rule 1) to cure the defect.

37. Both Wati J and Guneratne JA rejected this argument: they thought that the union's application was an application for a compliance order, and so the correct procedure had been adopted. Indeed, even if the union's application had not been for a compliance order, Guneratne JA would have rejected the argument on the basis that any procedural flaw should yield to the substantive rights of the parties unless there were compelling reasons for holding otherwise, and in this case there were not.

38. I agree with Wati J and Guneratne JA that there is no merit in this ground of appeal, but not for the reasons they gave. The company correctly argued that the relief which the union was seeking was not a compliance order, as the order for Mr Vaja's reinstatement and the payment to him of the equivalent of three months' salary had already been complied with. It was seeking, as I have said, a completely different order, namely the equivalent of Mr Vaja's salary for the period not covered by the original award. But where the company's elaborate argument breaks down is at the point of its assertion that the relief which the union was actually seeking could not be sought by a notice of motion. The ERT was the statutory successor of the arbitration tribunal established under the Trade Disputes Act (Cap 97), and the applications which the union made to the ERT by the notice of motion in question were, when properly analysed, (a) an interlocutory application for a compliance order (even though the original award of the arbitration tribunal had been complied with) *and* more importantly for present purposes (b) an interlocutory application for the *supplementation* of the original award to cover the period after Mr Vaja should have been reinstated by in the light of the inordinate length of time which had elapsed since the arbitration tribunal had first ordered Mr Vaja's reinstatement. Neither of these applications were applications made in new proceedings. They were applications made in existing proceedings, as the ERT had taken over the proceedings from the arbitration tribunal when (a) the Trade Disputes Act (Cap 97) (under which the dispute had originally been transferred to the arbitration tribunal) was repealed by section 265(1)(b) of the Act and (b) the ERT was established by section 202(1) of the

Act as the tribunal responsible, among other things, for those topics which had in the past been referred to an arbitration tribunal under the Trade Disputes Act (Cap 97). Since these applications were interlocutory applications in existing proceedings, they could be made by notice of motion and fresh originating process was not required.

39. This reasoning disposes of two related arguments deployed on the company's behalf. Both are premised on the fact that the original award of the arbitration tribunal limited Mr Vaja's compensation to the equivalent of three months' salary for the period from his dismissal to a day or so after 21 May 2007, the date on which he had to be reinstated by. One of the arguments is that this award had been complied with following the dismissal of the application for judicial review, and there was no further role for the ERT as the successor of the arbitration tribunal to play. This amounted to an argument that the ERT was, to use the Latin phrase, *functus officio*. The other argument is that the issue of Mr Vaja's compensation had already been definitively decided by the arbitration tribunal - in other words, the matter was, again to use the appropriate Latin phrase, *res judicata*, and could not be revisited by the courts except on an appeal. The answer to the first of these points is that what the union was really seeking on behalf of Mr Vaja was the supplementation of the original award to address his compensation for the period after the period covered by the original award. A court or tribunal is permitted to supplement an order which it previously made in order to deal with an issue which arose after its original order. Viewed in that way, the ERT was not *functus officio*. Moreover, the ERT was addressing the question of Mr Vaja's compensation for the period during which he would have been reinstated but for the stay. That was an issue which by definition could not have been decided by the arbitration tribunal as its decision predated that period. No question of *res judicata* therefore arises as the arbitration tribunal and the ERT were considering different topics.
40. Core arguments (2) and (3): The effect of the stay. The effect of the stay on the original award is said by the company to have frozen Mr Vaja's compensation until such time as the stay was lifted: it could not accumulate during the intervening period. Accordingly, core argument (2) is that the union was not entitled to claim compensation for Mr Vaja for any time during the period when the stay was in force. Core argument (3) is that what the union should have done if it had wanted to

preserve Mr Vaja's entitlement to compensation for the period when his reinstatement was stayed was to apply to the High Court for the stay on Mr Vaja's reinstatement to be conditional on the company undertaking to pay Mr Vaja's accumulated wages when the stay on his reinstatement was lifted. I do not agree with either of these arguments. The effect of the stay was not to deny Mr Vaja any compensation over and above that to which the original award related. Its effect was to prevent the original award from being enforced for the time being. In other words, it said nothing about what the award should be. It related only to when the award had to be complied with.

41. Three miscellaneous points. Three additional points need to be made. First, Wati J held that the company was obliged to pay Mr Vaja for the period during which he would have been reinstated but for the stay on the basis that (a) it was under an express duty pursuant to section 24 of the Act to provide him with work or to pay him for every day on which he did not work, and (b) it was under a duty to do so as a consequence of its duty of good faith which is implied into all contracts of employment. I do not agree. Any such duty was removed when the stay on the order for Mr Vaja's reinstatement was made.
42. Secondly, Wati J thought that the appeal to the ERC had to be struck out because of non-compliance with section 242 (5) (e) (iii) of the Act. That provides that no appeal can lie to the ERC from a compliance order made by the ERT without the leave of the ERT or the ERC. No such leave had been sought, and so the appeal itself could not have been brought. I do not agree. Wati J's view was predicated, of course, on her belief that the appeal to the ERC was *only* from a compliance order of the ERT. It was not. It was primarily an appeal from an order of the ERT supplementing an earlier order of the arbitration tribunal.
43. So what was the proper basis for Mr Vaja to have been awarded compensation for the period during which he would have been reinstated but for the stay? That is the third point which needs to be made. The answer is that the company chose to challenge the original award and to apply for a stay on its enforcement in the meantime. Had it not taken those steps, Mr Vaja would have been reinstated pursuant to the original award of the arbitration tribunal. That is not to say that the company was not entitled to take

those steps. Of course it was. But having decided to take them, it had to face the consequences of the High Court dismissing the application for judicial review, one of the consequences being that the stay on Mr Vaja's reinstatement had to be ignored because it had only been imposed in case the application for judicial review succeeded.

44. For all these reasons, then, I have concluded - in agreement with Guneratne JA - that the proposed appeal against the decision of the ERC does not have a sufficient chance of success to justify allowing the appeal to proceed after the expiry of the time for filing the notice of appeal. When coupled with the other factors which have to be considered when an application for an extension of time to file a notice of appeal is sought, it is plain that Guneratne JA's decision to refuse the company's application was not flawed.

Two final observations

45. I make two final observations. First, it is important that applications for an extension of time for filing a notice of appeal do not become the opportunity to argue the full merits of the appeal. When the court is considering the merits of the proposed appeal, it is only deciding whether there is sufficient merit in the proposed appeal to permit it to proceed to a full hearing. The only exception to that is where the delay is substantial, in which case the court is deciding whether the appeal will probably succeed. Even then, though, it will not be appropriate for the arguments to be developed in full. They need to be developed only to the extent that the court can determine the relative arguability of the grounds (and in cases of substantial delay the probability of success of any of those grounds). This judgment should not be regarded as a template for the detail in which those grounds are to be debated. I have discussed the arguments about the merits of the proposed appeal at length only out of deference to the care with which the written submissions have been prepared.
46. Secondly, the problems which have beset this case all arise from the extraordinary length of time it has taken for the proceedings to have reached the present stage. It is distressing that it is now almost 13 years since the incident which gave rise to the case. That lapse of time has not, for the most part, been caused by the litigants. It has been caused by systemic delays - primarily the time taken for hearings to be listed but

also the exceptional need for a replacement to be found for the judge who first heard the application for judicial review - as well as delays on the part of various judges to produce their judgments within a reasonable time. This was not a complicated or difficult case, and for my part I express the hope that judges will be able to organise their time in the future in such a way as to avoid the delays which have occurred in this case.

Conclusion

47. As I said at the beginning of this judgment, it would not be usual for leave to appeal against a refusal to extend the time for filing a notice of appeal to be given. However, in this judgment, I have endeavoured to summarise the principles of the law of Fiji in this area, and I have responded to Guneratne JA's request for the Supreme Court to address his view about the impact of mistakes made by lawyers. In my opinion, that issue is a matter of substantial general interest to the administration of civil justice, and I would therefore give the company leave to appeal. In accordance with the Supreme Court's usual practice, I would treat the hearing of the petition for leave to appeal as the hearing of the appeal, but for the reasons I have endeavoured to give, I would dismiss the appeal. Finally, I would order the company to pay \$5,000 towards the union's legal costs.

Calanchini J:

48. I have had the opportunity to read in draft form the judgment of Keith J and agree with his reasoning and conclusions.

Orders:

- (i) Leave to appeal granted.
- (ii) Appeal dismissed.
- (iii) The petitioner must pay \$5,000 to the respondent towards its legal costs.

Suresh Chandra

Hon. Mr. Justice Suresh Chandra
JUDGE OF THE SUPREME COURT



Brian Keith

Hon. Mr. Justice Brian Keith
JUDGE OF THE SUPREME COURT

W. Calanchini

Hon. Mr. Justice William Calanchini
JUDGE OF THE SUPREME COURT